SOUTHERN ESTATE SDN. BHD. & ANOR.

v.

TRACTORS MALAYSIA BHD.

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 190 OF 1978]
1 DECEMBER 1992

PRACTICE AND PROCEDURE: Want of prosecution - Plaintiff's action dismissed by court for want of prosecution - Plaintiff ordered by court to deposit RM50,000 as security for costs - Plaintiff did not deposit security for costs in court.

In this case, the Court dismissed the plaintiff's action for want of prosecution.

Held:
As the plaintiff who was ordered by the Court to give security for costs had failed to do so, the plaintiff's action was ordered to be dismissed for want of prosecution.

[Plaintiff's action dismissed for want of prosecution].

Cases referred to:
Giddings v. Giddings [1847] 10 Beav 29 ***(refd)***
La Grange v. McAndrew [1879] 4 QBD 210 ***(refd)***
Re Hunter's Trade-Mark [1887] WN 71 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 4 r. 1(1)

Other sources referred to:
Halsbury's, para 308, p. 233
Supreme Court Practice 1985, 23/1-3/30

For the plaintiff - Mohd. Anuar Datuk Ghani; M/s. Anuar Datuk Ghani & Associates
For the defendant - Norbert Yapp; M/s. Jayasuriya Kah & Co.

JUDGMENT

Syed Ahmad Idid J:
On 10 November 1992 I dismissed the plaintiffs' action for want of prosecution. I now give my grounds for doing so.

In order to understand and appreciate the history and status of the present action, which commenced in March 1978, the following will illustrate:

2 March 1978	Writ filed.
10 March 1978	Writ served.
31 March 1978	Memo of appearance entered.
22 April 1978	Application by plaintiff to enter judgment filed.
24 April 1978	Application by defendant to strike out statement of claim filed.
25 April 1978	Statement of defence filed.
10 July 1978	Application to strike out statement of claim by defendant fixed for hearing in Chambers.
21 July 1978	Application (motion) by plaintiff to enter judgment fixed for hearing in open court.
7 November 1978] 8 November 1978]	Both applications by plaintiff and defendant heard in open court.
7 November 1978	Application for judgment by plaintiff withdrawn.
20 January 1979	Judgment delivered. Application by defendant to strike out statement of claim dismissed with costs.
17 May 1982	Motion to appeal to Supreme (Federal) Court granted.
13 December 1983	Appeal to Federal Court dismissed.
12 June 1990	Summons for directions heard.
29 July 1991 (by SAR)	Application by defendant to dismiss the plaintiffs' action for want of prosecution fixed but this was withdrawn when the court fixed dates for trial of plaintiffs' action on 10 to 14 November 1992. The Assistant Registrar, after consulting the judge, confirmed the dates which were agreed to by Encik Anuar, the Counsel for the plaintiffs.
14 September 1992	Application by defendant for security for costs heard. Plaintiffs to deposit RM50,000 each as security for costs.
10 to 14 November 1992]	Dates for the trial (but trial could not proceed as the plaintiffs did not deposit the security for costs in court).
10 November 1992	Action dismissed.

Normally evidence at this stage is given on affidavits and/or by Counsel's statements at the bar. However, in this instance, learned Counsel, Encik Anuar Datuk Ghani, asked that correspondence between one of his clients and third parties be included. I quote him:

I request to refer to letters from Lands & Surveys but this is denied by the Honourable Court.

This was his reply in reference to the question whether his clients had deposited the RM50,000 x 2 = RM100,000 as security for costs. Encik Anuar then added:

I have not complied with court's order ... the money is not paid in, the trial cannot go on.

The "trial" refers to that scheduled for five days from 10 to 14 November 1992. The dates had been fixed and agreed to by both parties way back on 29 July 1991.

As the correspondence was put in issue by Encik Anuar, I shall refer to them as follows:

(a) Letter from Jabatan Tanah & Ukur, Kota Kinabalu, dated 25 April 1991 to Encik Tio Chee Hing on Pembayaran Pampasan Tanah Jalanraya Lahad Datu-Bakapit.

(b) Letter from Tio Chee Hing dated 15 September 1992 to Jurunilai, Lands & Surveys Department, Kota Kinabalu, on Pembayaran Pampasan Tanah Jalanraya Lahad Datu-Bakapit Highway purporting to authorise the release of RM100,000 to the Deputy Registrar, High Court, from another (and separate) court case OS K. 18 of 1992

(c) Letter from Tio Chee Hing dated 15 September 1992 to the Deputy Registrar, High Court, Kota Kinabalu, on Letter of Assignment to Deputy Registrar as Stakeholder for a sum of RM100,000. To Be Deposited In Court For Security For Costs In Civil Suit No. 190 of 1978 [in connection with a different matter of K. 18 of 1992 - see (b) above].

(d) Letter from Jurunilai, Jabatan Tanah & Ukur, Kota Kinabalu, dated 1 October 1992 to Timbalan Pendaftar, Mahkamah Tinggi, Kota Kinabalu, on Pembayaran Pampasan Pengambilan Tanah Untuk Projek Lebuhraya Lahad Datu-Bakapit (which merely states that the judge in T15/1991 had ordered that any questions regarding the claims must be referred to the judge, and the letter confirms that the office cannot pay out the RM100,000 as the matter is not yet settled in T. 15/1991).

(e) Letter from Jurunilai, Jabatan Tanah & Ukur, Kota Kinabalu, dated 27 October 1992 to Timbalan Pendaftar, Mahkamah Tinggi, Kota Kinabalu, on Pembayaran Pampasan Pengambilan Tanah Untuk Projek Lebuhraya Lahad Datu-Bakapit, a reminder to (d) above. It asks if it can deposit RM101,824.70 knowing full well that this money is for "T-15/1990" (should read "T-15/1991").

(f) Letter from Penolong Kanan Pendaftar, Mahkamah Tinggi, Kota Kinabalu, dated 28 October 1992 to Pengarah Tanah dan Ukur, Kota Kinabalu, on Pembayaran Pampasan Pengambilan Tanah Untuk projek Lebuhraya Lahad Datu-Bakapit in reply to (d) and (e) above, and it explains quite clearly that the claim in T.15/1991 has no relevance whatsoever with the present Kota Kinabalu matter.

(g) Letter from M/s. Anuar Datuk Ghani & Associates, Kota Kinabalu, dated 2 October 1992 to the Assistant Registrar, High Court, Kota Kinabalu, on Status of Hearing. At this time, the deposit as security for costs as ordered by the court was not paid in.

(h) Letter dated 10 October 1992 from Assistant Registrar, High Court, Kota Kinabalu, in reply to M/s. Anuar Datuk Ghani & Associates' letter at (g). This letter requests the law firm to confirm if the two plaintiffs had deposited the money as security for costs. It advises that "your case cannot proceed unless your client complies with the order of court as to payment of security for costs."

(i) Letter from Tio Chee Hing dated 23 October 1992 to Pengarah Tanah & Ukur, Kota Kinabalu on Letter of Assignment to Deputy Registrar, High Court, Kota Kinabalu For A Sum Of RM100,000 To Be Deposited In Court For Security For Costs In Civil Suit No. 190 of 1978. This letter states that the writer went to see the Deputy Registrar and the Deputy Registrar said "the court has no objection to receive same."

(j) Letter dated 3 November 1992 from M/s. Anuar Datuk Ghani & Associates to Deputy Registrar, High Court, Kota

Kinabalu, demanding that the court "inform us unequivocally whether or not Suit K. 190/78 will be heard on 10-14 November 1992". The solicitors added that they "do not wish to be put in a position where the money would be deposited into court and the case postponed ..." Although ethics and etiquette are absent from such a letter, the court nevertheless responded to it at (k) on the same day it was received.

(k) Letter dated 4 November 1992 from Assistant Registrar, High Court, Kota Kinabalu, replying to M/s. Anuar Datuk Ghani & Associates' letter at (j) stating that "unless and until the order (to deposit money as security for costs) is obeyed, the question of postponement or proceeding does not arise."

(l) Copy of the Tawau High Court Order in Originating Summons T. 15 of 1991 dated 3 June 1991. See letters at (a), (d), (e) and (f). The title numbers of the lands on this Tawau Court order are the same as those in Kota Kinabalu Originating Summons No. K. 18/1992 where Tio Chee Hing is the plaintiff and the Director of Lands & Surveys and the Government of the State of Sabah are defendants.

(m) A note from the Penolong Kanan Pendaftar dated 1 December 1992 "To Whom It May Concern" clarifying his meeting with Mr. Tio Chee Hing as claimed by Mr. Tio *vide* the latter's letter dated 23 October 1992 [see (i) above]. This Note confirms that the statement in (i) is not true and that the letter at (f) has explained that the money in T. 15/1991 is separate from this present action and should therefore not be put in issue.

The letters on Pembayaran Pampasan Tanah Jalanraya Lahad Datu-Bakapit at (a), (b), (c), (d), (e) and (f) should have no connection whatsoever with the instant case as that subject is more properly dealt by Tawau's case T. 15 of 1991. The plaintiff in the letters at (b) and (e) mention a fresh case of K. 18 of 1992 which was registered in March 1992 at the Kota Kinabalu High Court when in fact it is related to the T. 15 of 1991 at Tawau. Hence the plaintiff does not help anyone by this confusion. It would appear that the claim that the money belongs to Mr. Tio Chee Hing is incorrect if we see the Order (in T. 15 of 1991) dated 3 June 1991 [at (1) above]. There is a dispute as to who owns the money. So it is neither right nor proper for the plaintiffs or their Counsel in this instant action to claim that they can transfer the MR100,000 from Tawau Court to Kota Kinabalu Court and into a different action altogether.

The court in Kota Kinabalu arranged for an early date of trial and gave special attention to this action as it was long overdue. I granted the Assistant Registrar's arrangement for the trial to go on from 10 to 14 November 1992. This was fixed by the Senior Assistant Registrar as long ago as 29 July 1991, more than one year past. The application for security for costs was made on 14 September 1992, two months before the dates set for trial. The plaintiffs did not see fit to comply with the order of Court. Instead it appears for their convenience, they were looking for ways to delay. Was it an attempt to put the blame on the Courts when the Court did not allow the transfer of the money from the Tawau case to this Kota Kinabalu case? I cannot see any relevance of their application as the T. 15 of 1991 is on a different matter altogether.

Plaintiffs' Counsel used words like "unequivocally" [see (j) above] to compel the Court regarding the date of hearing while knowing full well that the Court would sit on 10 to 14 November 1992 as it had arranged this as a special case. It is timely to recall that on 25 July 1991, M/s. Anuar Datuk Ghani wrote to the Senior Assistant Registrar, Kota Kinabalu, to ask for an early date of hearing. Prior to that M/s. Chin, Mirdin & Co. asked the Deputy Registrar for "an earlier trial". As the matter of early trial of this action was so urgent, the Senior Assistant Registrar heard the application on 29 July 1991. Mr. Yapp, of Counsel for the defendant, then withdrew his application for dismissal of action for want of prosecution as the trial dates were immediately fixed on that day. I am of the opinion plaintiffs could have deposited the money before 10 November in which case the trial would have commenced.

One observation which may be useful to both parties is that the Kota Kinabalu case No. K. 18 of 1992 where Mr. Tio Chee Hing is plaintiff concerns "affected lands" exactly as listed in Tawau's T. 15 of 1991. The court in K. 18/1992 directed that "as the matter is the same as in T. 15/1991" it was to be heard after T. 15/1991 "so as not to confuse any issue" [O. 4 r. 1(1) of

the Rules of the High Court, 1980]. Plaintiffs' Counsel was also advised regarding the transfer of K. 18/1992 from Kota Kinabalu to Tawau High Court as the lands in question are in Lahad Datu.

I have considered the following before I dismissed plaintiffs' action:

(i) Supreme Court Practice 1985:

23/1-3/30: Default in giving security: if the plaintiff makes default in giving security he may be ordered to give security within a limited time, and in default the action may be dismissed. [*Giddings v. Giddings* [1847] 10 Beav. 29; and see *La Grange v. McAndrew* [1879] 4 QBD 210, where action was dismissed after order for security and stay of proceedings meantime].

(ii) Halsbury's - Para 308, p. 233: is in similar tune in that if a plaintiff has been ordered to give security for costs but does not do so, the action can be dismissed for want of prosecution. [Both *Giddings and LaGrange v. McAndrew* are cited in support in addition to *Re Hurter's Trade-Mark* [1887] WN 71]; and

(iii) *La Grange v. McAndrew* [1879] 4 QBD 210:

The plaintiff was ordered to give security for costs, the action being stayed in the mean time; but he failed to do so.

The defendant applied to dismiss the action for want of prosecution.

It was held that the judge has a discretion to make an order dismissing the action though the defendant had not abandoned the order for security for costs.

I have not taken the factors into consideration lightly. Each event has been pitted against the background and the environment as it occurred. While I appreciate that the plaintiff is "in the twilight of his life" (to quote his own Counsel), I am unable to equate that with the misuse to the Court's powers to prolong cases endlessly and indefinitely. Encik Anuar's demands to have the correspondence put into issue have not, in my opinion, assisted the second plaintiff but may have instead placed him in poor light. Despite that, I re-looked to see if there were any redeeming features to enable me to decide in another way but I could not discover any.